92-1862

NO.

Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM 1992

B. C., JR.,
Petitioner

v.

STATE OF LOUISIANA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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NUMBER CR 92-826

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA December 9, 1992

IN THE INTEREST OF B.C., JR.

Appellant

On Appeal from the Thirty-Fifth Judicial District Court, Parish of Grant, State of Louisiana; Honorable B.G. Lutes, Judge, Presiding

Before: LABORDE, THIBODEAUX, and CULPEPPER[1], Judges

LABORDE, Judge.

In this juvenile matter, the juvenile, B.C., Jr. appeals a condition of his probation that he receive home-bound instruction. Finding no error on the part of the juvenile court, we affirm.

FACTS

On September 18, 1991, the district

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[1] Judge Culpepper, retired, participated in this decision as Judge Pro Tempore.

attorney for the parish of Grant filed a petition of adjudication asking that the juvenile, B.C., Jr. (B.C.) be declared a child in need of supervision. The petition alleges that the juvenile was involved in continuous and long term disruptions at school, disturbances at school, fighting and hitting incidents at school, and batteries on classmates. The petition resulted from complaints filed with the Grant Parish Sheriff's office by two of the juvenile's classmates. The initial complaint was brought by a girl who complained that the juvenile intentionally ran over her while pushing her into a pole. This incident caused injury to the girl, but the extent of her injuries is not apparent from the record. The second complaint was brought by a boy who alleged that the juvenile threatened to beat him up if he did not relinquish

his lunch money. Upon his refusal to give the money, the juvenile choked him and had to be physically restrained by a teacher. Further, the juvenile coerced a third child to stab the complaining child in the last incident in the stomach with a pencil. This coercion was accomplished by telling the assailant that if he did not stab the complainant that the juvenile would beat him up.

Also contained in the record are numerous letters from teachers reflecting the juvenile's lack of respect for authority figures and abusive behavior towards others. On October 2, 1991, the juvenile court declared B.C. a child in need of supervision (CINS) and ordered him to receive home bound instruction.

A pre-dispositional investigation and psychological evaluation were filed with the juvenile court on October 22, 1991, along with a motion to modify or

rescind the juvenile court's order for homebound instruction. Subsequently, a hearing was held wherein testimony was elicited during which counsel agreed to submit the remainder of the matter on briefs. A second hearing was held on June 3, 1992, and the juvenile court rendered a judgment and disposition declaring the juvenile a CINS. The disposition included, as a special condition of probation, continued homebound instruction as provided by the Grant Parish Board of Education. The juvenile court ordered this homebound instruction to continue until October 20. 1995.

It is from this condition of probation which the juvenile appeals asserting three assignments of error.

ASSIGNMENTS OF ERRORS NUMBERS ONE AND TWO

The first two assignments will be discussed simultaneously as both involve

Title 20 U.S.C. sections 1400 et seq. At the outset, it should be noted that as a matter of law, juvenile action is neither criminal nor civil but of its own kind. In Re State in the Interest of Curley, 287 So. 2d 558 (La. App. 1st Cir. 1974).

In his first two assignments of error, the juvenile contends that a juvenile court does not have subject matter jurisdiction to order special educational placements nor does it have the power to order non-parties to provide specific services to juveniles found to be in need of supervision. The juvenile further alleges that this condition of probation erroneously overrules an IEP committee ruling in violations of 20 U.S.C. section 1400 et seq.

The juvenile argues that homebound instruction is not a dispositional option

under La.Ch.C.art.792.53 which provides:

Art. 792.53. Disposition: children in need of supervision.

In a case in which a child has been adjudicated to be in need of supervision, the court may do any of the following:

(1) Place the child in the custody of a parent or other suitable person on such terms and conditions as deemed in the best interest of the child and the public.

(2) Place the child on probation on such terms and conditions as deemed in the best interest of the child and the public.

(3) Assign the child to the custody of a private or public institution or agency.

(4) Commit a child found to be mentally defective to a public or private mental institution or an institution for the mentally defective.

(5) Make such other disposition or combination of the above dispositions as the court deems to be in the best interest of the child.

(6) Commit the child to the Department of Public Safety and Corrections for care and treatment. The department, however, shall not place a child in need of supervision in a correctional facility designed and operated exclusively for delinquent children.

Added by Acts 1991, No. 235, §7, eff. Jan. 1, 1992.

However, under the broad language of La.Ch.C.art.792.53(2), we find the juven-

ile court has the authority to place the child on homebound instruction. Furthermore, La.Ch.C.art.681(5) gives the juvenile court the authority to order any action deemed to be in the best interest of the child. Nothing in this legislation indicates ordering homebound instruction is an improper action on the part of the trial court. This article states the following:

Art.681. Dispositional alternatives

A. In a case in which a child has been adjudicated to be in need of care, the court may:

(1) Place the child in the custody of a parent or such other suitable person on such terms and conditions as deemed in the best interest of the child including but not limited to the issuance of a protective order pursuant to Article 618.

(2) Place the child in the custody of a private or public institution or agency.

(3) Commit a child found to be mentally ill to a public or private mental institution or institution for the mentally ill.

(4) Grant guardianship of the person of the child to any individual.

(5) Make such other disposition or combination of the above dispositions as

the court deems to be in the best interest of the child.

The record is replete with the juvenile's propensities for violence aimed at other students and teachers. The protection of these persons is encompassed by La.Ch.C.art.681(5). Further, the Department of Public Safety and Corrections recommended continued home-bound study in its pre-dispositional investigations. This recommendation may be considered by the court under La.Ch.C. art. 680.

> The court may consider the report of the predisposition investigation, and reports of mental evaluation, and all other evidence offered by the child or the state relating to the proper disposition. The court may consider evidence which would not be admissible at the adjudication hearing.

The juvenile further argues that inherent in federal and state laws are special regulations regarding students with disabilities and their educational treatment by the courts. Individual

Disabilities Education Act (IDEA) at 20 U.S.C. section 1400 et seq. However, the IDEA only applies to a school system's authority to expel or place handicapped students; it does not limit the authority of juvenile courts. Bill Honig, California Superintendent of Public Instruction, Petitioner v John Doe and Jack Smith, 484 U.S. 330 S.Ct. 592, 98 L.Ed. 686. In Honig, supra, the Court stated:

> Nor do we think that §1415(e)(8) operates to limit the equitable powers of district courts such that they cannot, in appropriate cases, temporarily enjoin a dangerous disabled child from attending school. As the EHA's legislative history makes clear, one of the evils Congress sought to remedy was the unilateral exclusion of disabled children by *schools*, not courts, and one of the purposes of §1415(e)(8), therefore, was "to prevent *school* officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings." *Burlington School Committee v. Massachusetts Dept. of Education*, 471 U.S., at 878, 105 S.Ct., at 2004 (emphasis added). The stay-put provision in no way purports to limit or pre-empt the authority

conferred on courts by §1415(e)(2), see *Doe v. Brookline School Committee*, 722 F.2d 910,917 (CA 1988); indeed, it says nothing whatever about judicial power.

It is apparent the juvenile court did not exceed its authority by placing the juvenile on homebound studies as part of his probation. Furthermore, a disposition may be modified on the court's own motion, or a motion filed by the district attorney, the parents, or the child. La.Ch.C.art.792.60. If at a later period of time, the best interest of the public and the child would no longer be to homebound the child, the court could then modify this condition. We therefore find the juvenile court had sufficient statutory authority to place the juvenile on homebound instruction as a condition of his probation. We further find the IDEA does not apply to a juvenile court judgment ordering a juvenile to be educated in a residential setting.

The juvenile also alleges the court does not have jurisdiction or authority to order the Grant Parish School board to teach the juvenile at home in his first two assignments of error. He contends this condition is not expressly granted by La.Ch.C.art. 792.53, supra. He further contends the court lacks personal jurisdiction over the non-party school board since the school board is not a party to this action. In essence, the juvenile is actually contending he is in a proper legal position to challenge the court's authority over the Grant Parish School Board. The juvenile's allegation that the court lacks personal jurisdiction, lends itself to the argument that the issue is in fact personal to the Grant Parish School Board. La.C.C.P.art. 381

provides:

> Except as otherwise provided by law, an action can be brought only by a person having a real and actual interest which he asserts.

This article is made applicable to the instant case by La.Ch.C. art. 104, which provides:

> Where procedures are not provided in this code or otherwise by law, the court shall proceed in accordance with:
>
> (1) The Code of Criminal Procedure in a delinquency proceeding and in a criminal trial of an adult.
> (2) The Code of Civil Procedure in all other matters.

The juvenile in this case does not have standing to challenge the court's authority over a third person not a party to the instant action. Further, Grant Parish School Board may intervene on its own behalf if it so desires. Assignments of error numbers one and two therefore lack merit.

ASSIGNMENT OF ERROR NUMBER THREE

In this assignment of error, the juvenile contends it was not proven by clear and convincing evidence that an educational placement in accordance with the IEP Committee decision was in the best interests of both the juvenile and the public. He alleges that under La.Ch.C. art. 792.54, the court should impose the least restrictive disposition. La.Ch.C.art. 792.54 states the following:

Art. 792.54. Disposition; generally

A. The court should impose the least restrictive disposition which the court finds is consistent with the circumstances of the case, the needs of the child, and the best interest of society. The court shall not remove a child from the custody of his parents unless his welfare or the safety and protection of the public cannot, in the opinion of the court, be adequately safeguarded without such removal.

B. If the court commits a child to a private institution or agency, it shall select one that has been licensed under state law. Where no institution, social agency, or association so licensed for care or placement of children is available to the court, the court may

commit the child to some other institution, social agency, or association which in the court's judgment is suitable for such child.

C. In committing a child to the custody of an individual or a private agency or institution, the court shall, whenever practicable, select a person, agency, or institution of the same religious faith as the child or his parents.

D. A child shall not be committed to a public or private mental institution or institution for the mentally defective unless the court finds, based on psychological or psychiatric evaluation, the child has mental disorder, other than mental retardation, which has a substantial adverse effect on his ability to function and requires care and treatment in an institution. The finding of such mental disorder shall not be made without the presence and participation of an attorney appointed from the Mental Health Advocacy Service (M.H.A.S.) to represent the child at the dispositional or modification hearing, unless attorneys from the M.H.A.S. are unavailable as determined by the director, or the child retains private counsel who shall represent only the interest of the child. The M.H.A.S. attorney so appointed shall continue to represent the child in any proceeding relating to admission, change of status, or discharge from the mental hospital or psychiatric unit. Upon modification of the disposition to a placement other than a mental hospital or psychiatric unit, the M.H.A.S. attorney shall be relieved of representation of the child.

The provisions of this Paragraph shall apply only to children who are in the custody of the state of Louisiana.

E. A child shall not be committed to a public or private institution for the mentally retarded unless the court finds, based on psychological or psychiatric evaluation, that the child is mentally retarded and such condition has a substantial adverse effect on his ability to function and requires care and treatment in an institution.

F. A child may be placed by the court in the custody of a relative or other responsible individual which for the purpose of the review hearing as provided for in Chapters 15 and 16 of Title VI shall be considered a permanent plan.

G. The Department of Public Safety and Corrections shall have the sole custody of a child committed to the department under this Chapter and shall determine the placement, care, and treatment of the child, and the expenditures to be made therefor.

The juvenile further contends that the evidence reveals that it is not in the best interest of the child or society to place this condition on his probation. However, we find La.Ch.C. art. 792.54 contemplates a disposition which affects the custody of a child and not an

educational placement. Every paragraph in the article implies a custodial or committal situation, and the custody of this juvenile is not at issue in this case. By suspending his sentence, the court allowed custody to remain with the parent. Under the statutory authority asserted above, parental custody is the least restrictive disposition. It is this custody that La.Ch.C. art. 792.54 contemplates and not any conditions of probation regarding a child's education.

The pre-dispositional investigation recommends homebound instruction and acknowledges the juvenile's violent propensities toward others. The only contradictory evidence in the predispositional investigation is a recommendation of Dr. D. H.. Texada, a psychiatrist who evaluated the child. Dr. Texada believes homebound instruction is not in the best interest of the juvenile;

however, the court must also consider the best interest of society under the Children's Code. Based upon the juvenile's past behavior exhibiting aggressiveness toward his classmates and teachers, we find it is the best interest of both the juvenile and society to continue with the juvenile's homebound instruction. The juvenile court therefore committed no error in so holding, and this assignment of error lacks merit.

DECREE

The decision of the juvenile court is affirmed. All costs of this appeal are assessed against the juvenile, B.C., Jr.

AFFIRMED.

Number J-760

STATE OF LOUISIANA IN THE INTEREST OF BENNETT COLLINS, JR. DOB: 10-20-78	JUVENILE COURT 35th JUDICIAL DISTRICT COURT

FILED JUNE 3, 1992

JUDGMENT OF DISPOSITION

This case came before the Court this day on a petition filed in regard to the above named juvenile and after consideration of evidence together with the testimony of witnesses.

IT IS THE FINDING OF THE COURT that the above named child Bennett Collins, Jr. is:

( ) delinquent and in need of the protection of the State.

(X) in need of supervision, and in need of the protection of the State.

IT IS THEREFORE ORDERED AND DECREED THAT Bennett Collins, Jr. be committed to the care and custody and control of:

( ) Department of Corrections until ___ day of _____, 19_____.

(X) Department of Corrections with placement suspended and placed on active supervised probation under the supervision of the Division of Youth Services until the 20th day of October, 1995.

GENERAL CONDITIONS OF PROBATION ARE:

(1) Obey your parents.

(2) Indulge in no unlawful, disorderly, injurious or vicioius habits of conduct, keep good company and reasonable hours.

(3) Follow your probation officer's advice and suggestions.

(4) When notified to report, do so promptly.

(5) Phone or write your probation officer if you cannot report.

(6) Work or attend school regularly.

(7) Do not leave the jurisdiction of this Court without permission.

SPECIAL CONDITIONS OF PROBATION ARE:

(1) Continued participation in the Child and Adolescent Services System Program (CASSP).

(2) Continued home bound instructions as provided by the Grant Parish Board of Ed.

(3) Attend other appropriate counseling as indicated.

THUS RENDERED on this 3rd day of November June, 1991.

(s) B. G. Lutes, Judge

35th Judicial District Court

Colfax, LOUISIANA

35TH JUDICIAL DISTRICT COURT

PARISH OF GRANT

IN THE INTEREST OF THE MINOR

BENETT COLLINS

D.O.B. 10-20-78

O R D E R

IT IS HEREBY ORDERED that BENETT COLLINS be given home bound instruction by the appropriate educational agency pending further orders of the Court.

IT IS FURTHER ORDERED that all appropriate social, psychological and educational materials be given to the Department of Public Safety and Corrections to aid them in the supervision of this juvenile.

THUS DONE AND SIGNED on this the 2nd day of October, 1991, Colfax, Grant Parish, Louisiana.

(s)_____

B.G. LUTES, DISTRICT JUDGE

THE SUPREME COURT OF THE STATE OF LOUISIANA

IN THE INTEREST OF B.C., JR.

NO. 93-CK-0040

IN RE:-- Confidential Party --; - Plaintiff(s); Applying for Writ of Certiorari and/or Review, Supervisory and/or Remedial Writ; to the Court of Appeal, Third Circuit; Number CR92-0826; Parish of Grant 35th Judicial District Court Number J-706

February 19, 1993

Denied.

HTL

PFC

WFM

JLD

JCW

PH

KIMBALL, J., would grant the writ.

ORTIQUE, J., not on panel

Supreme Court of Louisiana
February 19, 1993

(s)
Clerk of Court for the Court

RULE IX. REHEARINGS

Section 6. An application for rehearing will not be considered when the court has merely granted or denied an application for a writ of certiorari or a remedial or other supervisory writ, or when the judgment of this court is merely overruling a motion to dismiss an appeal or a motion to recall or rescind a rule nisi, or when, for any reason, the judgment has not finally disposed of the case in this court, or when an election case has been decided as provided by Rule X, Section 4(c).

Amended and effective May 27, 1976.

INDIVIDUALS WITH DISABILITIES EDUCATION ACT, 20 U.S.C.

Sec. 1400. Congressional statements and declarations

(a) *Short title*

This chapter may be cited as the "Individuals with Disabilities Education Act".

(b) *Findings*

The Congress finds that--

(1) there are more than eight million children with disabilities in the United States today;

(2) the special educational needs of such children are not being fully met;

(3) more than half of the children with disabilities in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

(4) one million of the children with disabilities in the United States are

excluded entirely from the public school system and will not go through the educational process with their peers;

(5) there are many children with disabilities throughout the United States participating in regular school programs whose disabilities prevent them from having a successful educational experience because their disabilities are undetected;

(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide

effective special education and related services to meet the needs of children with disabilities;

(8) State and local educational agencies have a responsibility to provide education for all children with disabilities, but present financial resources are inadequate to meet the special educational needs of children with disabilities; and

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of children with disabilities in order to assure equal protection of the law.

(c) *Purpose*

It is the purpose of this chapter to assure that all children with disabilities have available to them, within the time periods specified in section 1412(2)(B) of this title, a free

appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.

Sec. 1401. Definitions

(a) *As used in this chapter--*

(1)(A) The term "children with disabilities" means children--

(i) with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other

health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, need special education and related services...

(6) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, Commonwealth of the Northern Mariana Islands, or Palau (until the compact of Free Association with Palau takes effect pursuant to section 101(a) of Public Law 99-658).

(7) The term "State educational agency" means the State board of Education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability, including--

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education....

(18) The term "free appropriate public education" means special education and related services that--

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title....

(20) The term "individualized education program" means a written statement for each child with a disability developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include--

(A) a statement of the present levels of educational performance of such child,

(B) a statement of annual goals, including short-term instructional objectives,

(C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs,

(D) a statement of the needed transition services for students beginning no later than age 16 and annually thereafter (and, when determined appropriate for the individual, beginning at age 14 or younger), including, when appropriate, a statement of the interagency responsibilities or linkages (or both) before the student leaves the school setting.

(E) the projected date for initiation and anticipated duration of such services, and

(F) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

In the case where a participating agency, other than the educational agency, fails to provide agreed upon services, the educational agency shall reconvene the IEP team to identify alternative strategies to meet the transition objectives.

Sec. 1412. Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all children with disabilities the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State wil undertake or has undertaken in order to assure that;

(A) there is established

(i) a goal of providing full educational opportunity to all children with disabilities,

(ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all

children with disabilities between the ages of three and eighteen within the State not later than September 1, 1980, except that, with respect to children with disabilities aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related

services and which children are not currently receiving needed special education and related services;

(D) policies and procedures are established in accordance with detailed criteria prescribed under section 1417(c) of this title; and

(E) any amendment to the plan submitted by the State required by this section shall be available to parents, guardians, and other members of the general public at least thirty days prior to the date of submission of the amendment to the Secretary.

(3) The State has established priorities for providing a free appropriate public education to all children with disabilities, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to children with disabilities who are not

receiving an education, and second with respect to children with disabilities, within each disability category, with the most severe disabilities who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

(4) Each local educational agency in the State will maintain records of the individualized education program for each child with a disabilitiy, and such program shall be established, reviewed, and revised as provided in section 1414(a)(5) of this title.

(5) The State has established

(A) procedural safeguards as required by section 1415 of this title;

(B) procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other

care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily; and

(C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of children with disabilities will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and

no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for children with disabilities within the State, including all such programs administered by any other State or local agency will be under the general supervision of the persons responsible for educational programs for children with disabilities in the State educational agency and shall meet education standards of the State educational agency. This paragraph shall not be construed to limit the responsibility of agencies other than educational agencies in a State from providing or paying for some or all of the costs of a free appropriate public

education to be provided children with disabilities in the State.

(7) The State shall assure that

(A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of children with disabilities, including individuals with disabilities and parents or guardians of children with disabilities, and

(B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and section 1413 of this title.

Sec. 1415. Procedural safeguards

(a) *Establishment and maintenance*

Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that children with disabilities and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) *Required procedures; hearing*

(1) The procedures required by this section shall include, but shall not be limited to--

(A) an opportunity for the parents or guardian of a child with a disability to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free

appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit--

(i) proposes to initiate or change, or

(ii) refuses to initate or change, the identification, evaluation, or educational placement of the child or the

provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the

local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) *Review of local decision by State educational agency*

If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

(d) enumeration of rights accorded parties to hearings

Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded--

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities,

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses,

(3) the right to a written or electronic verbatim record of such hearing, and

(4) the right to written findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section 1417(c) of this title and shall also be transmitted to the advisory

panel established pursuant to section 1414(a)(12) of this title.

(e) *Civil action; jurisdiction*

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United

States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hearing additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4)(A) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party.

(C) For the purpose of this subsection, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offfer of settlement to a parent or guardian, if--

(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;

(ii) the offer is not accepted within ten days; and

(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlment.

(E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs may be

made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Whenever the court finds that--

(i) the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience, and reputation; or

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding, the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this subsection.

(G) The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violaton of this section.

(f) *Effect on other laws*

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal statutes protecting the rights of children and youth with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections(b)(2) and (c) of this section shall be exhausted to the same extent as

would be required had the action been brought under this subchapter.

34 CFR, PART 300 Selected Sections

Sec. 300.7 Children with disabilities

(a)(1) As used in this part, the term "children with disabilities" means those children evaluated in accordance with Secs. 300.530 -300.534 as having mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including autism, traumatic brain injury, other health impairments, specific learning disabilities, deaf-blindness, or multiple disabilities, and who because of those impariments need special education and related services. ...

(b) The terms used in this definition are defined as follows: ...

(9) "Serious emotional disturbance" is defined as follows:

(1) The term means a condition exhibiting one or more of the following

characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance --

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors;

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(C) Inappropriate types of behavior or feelings under nomal circumstances;

(D) A general pervasive mood of unhappiness or depression; or

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have a serious emotional disturbance.

Sec. 300.305 Program options

Each public agency shall take steps to ensure that its children with disabilities have available to them the variety of educational programs and services avialable to nondisabled children in the area served by the agency, including art, music, industrial arts, consumer and homemaking education, and vocational education.

Sec. 300.343 Meetings

(a) *General*

Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising the IEP of a child with a disability (or, if consistent with State policy and at the discretion of the LEA, and with the concurrene of the parents, an individualized family service plan des ribed in section 677(d) of the Act for

each child with a disability, aged 3 through 5)....

(c) *Timeline*

A meeting to develop an IEP for a child must be held within 30 calendar days of a determination that the child needs special education and related services.

(d) *Review*

Each public agency shall initiate and conduct meetings to review each child's IEP periodically and, if appropriate, revise its provisions. A meeting must be held for this purpose at least once a year.

Sec. 300.344 Participants in meetings

(a) *General*

The public agency shall ensure that each meeting includes the following participants:

(1) A representative of the public agency, other than the child's teacher,

who is qualified to provide, or supervise the provision of, special education.

(2) The child's teacher.

(3) One or both of the child's parents, subject to Sec. 300.345.

(4) The child, if appropriate.

(5) Other individuals at the discretion of the parent or agency.

(b) *Evaluation personnel*

For a child with a disability who has been evaluated for the first time, the public agency shall ensure--

(1) That a member of the evaluation team participates in the meeting; or

(2) That the representative of the public agency, the child's teacher, or some other person is present at the meeting, who is knowledgeable about the evaluation procedures used with the child and is familiar with the results of the evaluation.

(c) *Transition services participants*

(1) If a purpose of the meeting is the consideration of transition services for a student, the public agency shall invite--

(i) The student; and

(ii) A representative of any other agency that is likely to be responsible for providing or paying for transition services.

(2) If the student does not attend, the public agency shall take other steps to ensure that the student's preferences and interests are considered; and

(3) If an agency invited to send a representative to a meeting does not do so, the public agency shall take other steps to obtain the participation of the other agency in the planning of any transition services.

Section 300.533 Placement procedures

(a) In interpreting evaluation data and in making placement decisions, each public agency shall--

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendatons, physical condition, social or cultural background, and adaptive behavior;

(2) Ensure that information obtained from all of these sources is documented and carefully considered;

(3) Ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(4) Ensure that the placement decision is made in conformity with the LRE rules in Secs. 300.550-300.554.

(b) If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child in accordance with Secs. 300.340-300-350.

Sec. 300. 551 Continuum of alternative placements

(a) Each public agency shall ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

(b) the continuum required in paragraph (a) of this section must --

(1) Include the alternative placements listed in the definition of special education under Sect. 300.17 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and

(2) Make provision for supplementary services (such as resource room on itinerant instruction) to be provided in conjunction with regular class placement.

Sec. 300.552 Placements

Each public agency shall ensure that:

(a) The educational placement of each child with a disability--

(1) Is determined at least annually;

(2) Is based on his or her IEP; and

(3) Is as close as possible to the child's home.

(b) The various alternative placements included at Sec. 300.551 are available to the extent necessary to implement the IEP for each child with a disability.

(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the

school that he or she would attend if nondisabled.

(d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs.

§ 449. Homebound Placement Rules

The placement of an exceptional child, excluding children whose only exceptionality is hospital/ homebound, by a school system in a program of homebound or hospital instruction may be proposed only if one of the following exists:

A. The exceptional child possesses a physical impairment or illness which directly (or because of treatment required) precludes the child's movement from a hospital or home environment to the general educational environment.

B. Consistent with the requirements of these Regulations, the child has been determined to be seriously emotionally disturbed and:

1. A psychologist or psychiatrist who is licensed to prectice in Louisiana

has certified in a signed written report filed with the Office that the child is admitted to a full-time inpatient program of care and treatment in a hospital certified or licensed by the State of Louisiana and that continued participation in the inpatient program is necessary to the proper care and treatment of the child.

2. A psychologist or psychiatrist who is licensed to practice in Louisiana has certified in a signed written report submitted to the school system and filed with the Office that:

a. The child is seriously emotionally disturbed.

b. The child is being provided a program of continuous care and treatment which would be seriously disrupted by movement to the general educational environment.

c. The program of care and treatment in concert with the proposed homebound instruction should permit the return of the child to the general educational environment at a specified date.

d. A copy of the treatment plan for the child signed by the psychiatrist or psychologist is attached to the written report together with a statement that the psychiatrist or psychologist will notify the school system if the treatment plan is significantly changed or discontinued.

C. A child who is awaiting approval of Regional Review for placement in a residential facility and form whom a school-based interim program has been unsuccessfully implemented because of the severity of the handicap of threat of danger to self or others.

D. An exceptional child is detained by court order in a juvenile detention facility.

E. An exceptional child is undergoing disciplinary actions. Time limits are subject to the provisions of § 459.

LOUISIANA DEPARTMENT OF EDUCATION
PUPIL APPRAISAL HANDBOOK
BULLETIN 1508
REVISED 1983

PAGE 41 BEHAVIOR DISORDERED

I. DEFINITION

A behavior disorder is a pattern of situationally inappropriate interpersonal or intrapersonal behavior which is exhibitted over an extended period of time and to a significant degree, and which cannot be explained by intellectual, sensory, neurological, or general health factors. One or more of the following behavior patterns shall be exhibited:

A. Inappropriate types of behavior or feelings under normal circumstances;

B. A general pervasive mood of unhappiness, depression, or withdrawal; or

C. A tendency to develop ohysical symptoms or fear associated with personal or school problems.

The term never includes students who are autistic: it may include students who are socially maladjusted if it is determined that they are also behavior disordered.

NOTE: Children with behavior problems brought on by a temporary crisis situation, such as death in the family, illness, or other economic or social problems are generally not included in this category unless all eligibility criteria are met.

35TH JUDICIAL DISTRICT COURT
PARISH OF GRANT
IN THE INTEREST OF THE MINOR
BENETT COLLINS
D.O.B. 10-20-78 FILED OCTOBER 22, 1991

MOTION TO MODIFY OR RESCIND ORDER

The Motion of Benett Collins, represented herein by the Advocacy Center for the Elderly and Disabled, Margherita McWilliams, attorney, respectfully states that:

1.

On October 2, 1991, this Honorable Court, in the above-captioned matter involving the juvenile, signed an Order which required the juvenile to receive educational services in a homebound program. This Court was not made aware of local, State, or Federal laws and regulations concerning educational placement for handicapped students.

2.

The juvenile shows that he is classified pursuant to State and Federal

law as a student with a handicap, namely, a behavior disorder, which entitles him to rights and protection afforded him under the Inditivituals with Disabilities Education Act, 20 USC 1401 *et seq.* and the Louisiana Exceptional Children's Act, LA R.S. 17:1941 *et seq.*

3.

The State and Federal statutes cited above provide specific procedures for determining the nature and placement of an educational program for handicapped students. These procedures require school districts to evaluate the special educational needs of a handicapped child and to meet with parents in team meetings to decide the nature of services and programs to be provided the child.

4.

Grant Parish School Board is currently supplying a teacher at Benett Collins' home, in accordance with this

Court's October 2, 1991 Order. However, following this Court's October 2, 1991 Order, on Otober 11, 1991, personnel of Grant Parish School Board met with the parent of Benett Collins. Present were Rhonda Collins; Benett Collins, represented by the undersigned counsel; Brian Hines, Principal of Montgomery-Gaines Junior High School; Ollie Goudeau, Supervisor of Special Education, Grant Parish School Board; a school psychologist; and Benett Collins' special education teacher. This team agreed that Benett Collins should return to Montgomery-Gaines Junior High School with a full-time aide assigned to control his behavior and a restricted classroom setting. Grant Parish School Board also reversed its recommendation of expulsion for Benett.

5.

Counsel for Benett Collins respectfully suggests that this Court, acting as a juvenile court, lacks jurisdiction over the educational program provided to Benett Collins, under the provisions of State and Federal law. It is respectfully requested, therefore, that this Honorable Court rescind its Order of October 2, 1991.

6.

In the alternative, it is respectfully submitted that this Court should defer to the professional judgment of the educational personnel who have recommended a return to school for Benett Collins, subject to certain restrictions.

7.

It is further suggested that a hearing on this Motion be set prior to the November 14, 1991 disposition hearing to avoid undue hardship to the juvenile

and to allow Grant Parish School Board to implement its recommendations for educating Benett Collins.

WHEREFORE, MOVANT, Benett Collins respectfully requests that this Court set hearing on this Motion, and that after due consideration of the issues presented, it grant this Motion to Rescind its October 2, 1991 Order, or modify it as suggested herein.

Respectfully submitted,

THE ADVOCACY CENTER FOR THE ELDERLY AND DISABLED
(s)_____
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Tele: (318) 865-6186

CERTIFICATE OF SERVICE

I cetify that a copy of the above and foregoing Motion has been served on opposing counsel, James Lewis, Assistant District Attorney, by mailing a copy of same to him, first class, postage prepaid, at his office address, P.O. Box 309, Colfax, LA 71417 on this 18th day of October, 1991.

35TH JUDICIAL DISTRICT COURT

PARISH OF GRANT

IN THE INTEREST OF THE MINOR

BENETT COLLINS

D.O.B. 10-20-78

O R D E R

Considering the above and foregoing Motion to Modify or Rescind Order,

IT IS ORDERED that a hearing on this matter be set on the 14th day of November, 1991.

THUS DONE AND SIGNED this 22nd day of October, 1991, Colfax, Grant Parish, Louisiana.

(s)_____
B.G. LUTES, District Judge

JUVENILE DOCKET NUMBER J-760

STATE OF LOUISIANA IN THE INTEREST OF BENNETT COLLINS	35TH JUDICIAL DISTRICT COURT JUVENILE COURT
FILED MAY 1992	PARISH OF GRANT

MOTION

NOW INTO COURT comes Benett Collins, a minor, represented herein by undersigned counsel, who respectfully submits to the Court that the Order of this Court, dated October 2, 1991, which ordered the child to receive his special educational services in a homebound setting, should be set aside, and that the minor should be retuirned to his least restrictive educational setting, in accordance with recommendations of the Grant Parish School Board, for the following reasons:

1.

The minor, through his counsel, filed a Motion to Modify or Rescind Order on October 22, 1991, seeking to set aside

or to modify the Court's order that he receive homebound educational services. The Motion was set for hearing on November 14, 1991.

2.

Following the November 14, 1991 hearing, this Court ordered that counsel for both parties, the State of Louisiana and the minor, submit briefs to aid the Court in reaching its decision. Counsel for the minor submitted her Memorandum on November 27, 1991.

3.

Counsel for the State of Louisiana has not filed a brief or memorandum as ordered by this Court. Counsel for the minor communicated with counsel for the State on February 24, 1992, concerning his Memorandum, but has had no further communication since that time.

4.

The Memorandum filed by counsel for the minor shows that this Court lacks

jurisdiction to render an order requiring the minor to receive homebound educational services, thus said Order must be set aside.

5.

Testimony adduced at the November 14, 1991 hearing shows that appropriate personnel from the Grant Parish School Board had recommended that Benett Collins return to Montgomery-Gaines Junior High School. The recommendations of the school board, and the legal effect of the aid recommendations as they relate to the minor's educational services, are fully discussed in counsel's Memorandum.

6.

In addition, Grant Parish School Board has recently completed a re-evaluation of the minor's special educational needs, in accordance with state and federal law and regulation. The evaluation, dated January 22, 1992,

includes recommendations from a psychiatrist, Dr. Paul D. Ware. Dr. Ware recommends that the minor return to school. (Exibit A, attached).

7.

The minor, his mother, and the Grant Parish School Board, Special Education Department, desire that Benett Collins return to school, where he may receive special educational services to address his behavior problems.

8.

Counsel for the minor suggests that, in considering the law and the evidence presented by the minor, and also considering the fact that counsel for the State of Louisiana has failed to offer any legal justification for its opposition to the original Motion to Modify and Rescind, this Court should now rescind its October 2, 1991 Order.

9.

In the alternative, and only in the alternative that this Court believes it necessary to hear additional testimony, counsel for the minor suggests that a new hearing be set on this instant Motion.

WHEREFORE, Benett Collins respectfully requests that this Court immediately rescind and revoke its Order of October 2, 1991, which required the minor to be restricted to the receipt of educational services in his home.

IN THE ALTERNATIVE, and only in the alternative that this Court should deem it necessary to take additional or new evidence, the Court is requested to set this Motion for a hearing, at which time a ruling may be made.

Respectfully submitted,

ADVOCACY CENTER FOR THE ELDERLY AND DISABLED
(s)_____
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SUPREME COURT

STATE OF LOUISIANA

NO. 93-CK-0040

IN THE INTEREST OF B.C., JR.

APPLICATION FOR WRITS OF CERTIORARI AND REVIEW TO REVIEW A JUDGMENT OF THE THIRD CIRCUIT COURT OF APPEAL RENDERED IN MATTER NO. CR92-826

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